IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]. 53

UNITED STATES OF AMERICA,
Appellant,

v.

THE PHILADELPHIA NATIONAL BANK and
GIRARD TRUST CORN EXCHANGE BANK.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania.

MOTION TO AFFIRM ON BEHALF OF THE PHILADELPHIA NATIONAL BANK, APPELLEE.

Arthur Littleton,
Ernest R. von Starck,
Don B. Blenko,
Donald A. Scott,
2107 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Penna.,
Attorneys for The Philadelphia National Bank, Appellee.

Morgan, Lewis & Bockius,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

TABLE OF CITATIONS.

Cases:

TABLE OF CITATIONS (Continued).

IN THE

Supreme Court of the United States.

October Term, 1961.

No. 799.

UNITED STATES OF AMERICA,
Appellant,

v.

THE PHILADELPHIA NATIONAL BANK and GIRARD TRUST CORN EXCHANGE BANK

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM ON BEHALF OF THE PHILADELPHIA NATIONAL BANK, APPELLEE.

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, The Philadelphia National Bank (hereinafter called "PNB") moves that the judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED.

In order to affirm the judgment of the district court at this stage, this Court does not have to examine all of the many questions which would be presented to it at full argument. It is necessary only to reach the following conclusions:

1. Mergers consummated under the national banking laws, such as the proposed one, are not subject to the provisions of Section 7 of the Clayton Act.

2. There is no showing that the proposed merger would constitute a restraint of trade under Section 1 of the Sherman Act.

These two determinations by the district court are so clearly correct as not to need further argument. The non-applicability of Section 7 of the Clayton Act, a purely legal question, has been previously determined by this Court and is clear from the language and legislative history of the applicable statutes. The non-violation of the more stringent provisions of Section 1 of the Sherman Act can also readily be determined inasmuch as appellant failed to produce any evidence or testimony that the proposed merger would constitute an unreasonable restraint of trade.

ARGUMENT.

The district court's opinion contains a complete review of the proceedings and no purpose will be served by repetition. It will be sufficient for the purposes of this motion to set forth the following conclusions upon which the district court based its judgment:

1. That the Bank Merger Act of 1960, 74 Stat. 129, amending 12 U. S. C. § 1828(c) (Supp. II, 1961), does not preclude a review of the proposed merger under the antitrust laws (J. S. 12a-17a).[1]

2. That Section 7 of the Clayton Act, 15 U. S. C. § 18 (1958), does not apply to a bank merger of this nature (J. S. 17a-21a).

1. References to appellant's Jurisdictional Statement and Appendix are designated "J. S.". The requested findings of fact affirmed by the district court but not contained in the opinion are printed as a separate Appendix filed herewith by both appellees. References to pages in this Appendix are identified by the letter "b".

3. That commercial banking, as such, is a separate and distinct line of commerce, or a product market, for the purpose of testing the proposed merger under the antitrust laws (J. S. 24a-28a).

4. That the four-county area, consisting of Philadelphia and the three contiguous counties in Pennsylvania, is not a section of the country or a relevant geographic market for the purpose of testing the proposed merger under the antitrust laws (J. S. 29a-31a).

5. Assuming arguendo that Section 7 of the Clayton Act is applicable and that the four-county area is an appropriate section of the country, there is no reasonable probability that competition among commercial banks in the four-county area would be substantially lessened or that the proposed merger would tend to create a monopoly in commercial banking in the four-county area in violation of Section 7 of the Clayton Act (J. S. 31a-41a).

6. Assuming that the four-county area is the relevant geographic market, there is no evidence that the proposed merger would result in an unreasonable restraint of trade or commerce under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1958) (J. S. 41a-43a).

Upon full argument of this case it would be necessary to examine each one of these points, but on this motion it is sufficient to review Conclusions 2 and 6 only. Obviously, if the Clayton Act is not applicable, and if it is readily evident that the Sherman Act has not been violated, this Court need go no further. Moreover, in order to simplify this motion, it will be assumed in considering the Sherman Act that commercial banking is a separate product market and that the four-county area is the relevant geographic market. Even with the issues thus limited, the decision of the district court is so obviously correct that further argument is unnecessary.

I. The Proposed Merger Is Not Within the Scope of Section 7 of the Clayton Act.

Appellant admits, as indeed it must, that the proposed merger is within the scope of section 7 only if it constitutes a stock acquisition rather than an acquisition of assets (J. S. 30). Accordingly the sole issue is whether the proposed merger encompasses an acquisition of stock.

Under the Agreement of Consolidation conforming to the national banking laws, 12 U. S. C. § 215 (Supp. II, 1961), "the corporate existence of Girard shall be merged into and continue in Philadelphia National which shall continue in existence as the Association, and the Association shall be deemed to be the same corporation as each of the consolidating banks." All of the property of each of the banks "shall be vested in the Association without any conveyance or transfer; and the Association shall be responsible for all the liabilities of every kind and description * * * of each bank existing as of the effective date" (J. S. 18a).

The Agreement of Consolidation also provides that immediately upon the merger becoming effective, the PNB stock certificates shall automatically represent shares of stock in the new Association, and that Girard certificates shall be surrendered to the Association in exchange for new certificates representing the number of shares in the Association "to which such shares of stock in Girard shall have been converted" (J. S. 19a).

Appellant contended before the district court that under the language of the Agreement PNB was acquiring the stock of Girard. It has abandoned this argument following the indisputable finding of the district court that (J. S. 20a):

> "The entire transaction is patterned in conformity with the applicable federal statute relating to bank consolidations and mergers of assets. The fact that certificates representing shares of stock are exchanged for new ones is merely incidental to the transaction, and in no way affects or alters its character."

Appellant now advances the equally remarkable contention that the merger "may be viewed" as consisting of an acquisition of stock by the new Association accompanied by an acquisition of the assets of the two banks by the new Association, both of which occur "in a single step" (J. S. 31-32). Quite possibly mergers have never been so "viewed" because this theoretical concept is directly contrary to the facts. In this merger, the assets and businesses of the two constituent companies will be combined by operation of law, and the interests of the shareholders of the two companies will automatically become proportionate interests in the new corporation without any transfer of stock. As the district court held, this transaction has entirely different indicia, mechanics and consequences than does an acquisition of stock (J. S. 20a-21a).

This Court has held in *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission*, 291 U. S. 587 (1934), construing the same language which appellant seeks to invoke here, that a statutory merger is not an acquisition of stock under section 7 of the Clayton Act. In that case, a holding company had acquired the common stock of two competitors, but, after the Federal Trade Commission had challenged the acquisition, the stock was transferred, the holding company was dissolved, and the two competitors were merged into a new corporation. In finding that the Commission had no jurisdiction under the Clayton Act, this Court said:

> "The statute does not forbid * * * the merger of corporations pursuant to state laws, nor does it provide any machinery for compelling * * * the distribution of physical property brought into a single ownership by merger.
>
> If, instead of resorting to the holding company device, the shareholders of Arrow and Hart & Hegeman had caused a merger, this action would not have been a violation of the Act." (291 U. S. at 595)

> "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other than those found in the Clayton Act. And if any remedy for such violation is afforded, a court and not the Federal Trade Commission is the appropriate forum." (291 U. S. at 599)

Furthermore, although the court divided 5 to 4 on a point not here involved, Mr. Justice Stone, speaking for the minority consisting of himself, Chief Justice Hughes, and Justices Brandeis and Cardozo, agreed:

> "It is true that the Clayton Act does not forbid corporate mergers but it does forbid the acquisition by one corporation of the stock of competing corporations so as substantially to lessen competition." (291 U. S. at 600)

A subsequent attempt by appellant to attack a statutory merger as a stock acquisition under section 7 of the Clayton Act was rejected by the District Court for the Southern District of New York, following "the clear mandate of the Arrow-Hart decision." *United States v. Celanese Corp.*, 91 F. Supp. 14, 16 (S. D. N. Y. 1950). In that case it was said that "Section 7 was not intended to apply to * * * the open uniting of the property of two or more corporations by legitimate reorganization, consolidation or merger" (91 F. Supp. at 17).

Appellant's argument that the decision of this Court in *United States v. duPont & Co.*, 353 U. S. 586 (1957) "put to rest the dictum" in *Arrow-Hart*, is totally unjustified. A reading of *Arrow-Hart* will show that the exclusion of corporate mergers from the impact of section 7 of the Clayton Act was not dictum. Moreover, it does not need argument to show that in the *duPont* case this Court was concerned

only with the question of whether section 7 applied to vertical as well as horizontal stock acquisitions.

Appellant's contention is most extraordinary in view of the fact that the Department of Justice advised Congress in connection with the passage of the Bank Merger Act of 1960 that the stock acquisition clause of the Clayton Act does not apply to bank mergers. Congressional acceptance of this view is evident from the legislative history. In the report of the House Committee on Banking and Currency on the Bank Merger Act of 1960, H. REP. No. 1416, 86th Cong., 2d Sess. (1960), this statement appears at page 9:

> "Because Section 7 is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisitions of stock, and because bank mergers are accomplished by assets rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers."

The chairman of the House Committee on Banking and Currency, Representative Spence, subsequently reaffirmed this statement on the floor during debate on the bill:

> "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." (106 Cong. Rec. 7257 (1960)).

In the report of the Committee on Banking and Currency of the Senate on the same Act, S. REP. No. 196, 86th Cong., 1st Sess. (1959), it is said at page 5:

> "In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal

> Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected)."

And Senator Robertson, chairman of the Senate Committee on Banking and Currency, made the following statement on the floor of the Senate during debate on the bill:

> "In the opinion of the committee it is impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act." (105 Cong. Rec. 8076 (1959)).

The language of Section 7 of the Clayton Act, the Agreement of Consolidation conforming to the national banking laws, the legislative history, and the decision of this Court in the *Arrow-Hart* case, are decisive. The non-applicability of Section 7 of the Clayton Act to the proposed merger should require no further argument before this Court.

II. There Is No Evidence That the Proposed Merger Will Constitute an Unreasonable Restraint of Trade in Violation of Section 1 of the Sherman Act.

The evidence which appellant presented to the district court was basically directed at proving a violation of Section 7 of the Clayton Act, with its test of "reasonable probability", rather than Section 1 of the Sherman Act. Appellant states that "The significance of the present case is that it involves the elimination of substantial and direct competition between the second and third largest commercial banks in the four-county Philadelphia area" (J. S. 19). This is a Clayton Act test, as appellant recognizes (J. S. 29). However, in view of the fact that Section 7 of the Clayton Act is not applicable to the proposed merger, appellant's evidence must meet the "more stringent" requirements of Section 1 of the Sherman Act by "a definite factual show-

ing of illegality". *Times-Picayune Pub. Co. v. United States*, 345 U. S. 594, 609-610 (1953); *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 377 (1933); *Standard Oil Co. v. United States*, 283 U. S. 163, 179 (1931).[2]

After thorough analysis, the district court found "nothing in this record" to support a finding of a violation of Section 7 under the reasonable probability test of the Clayton Act (J. S. 48a). Therefore the contention that the merger violates the more stringent standards of the Sherman Act does not present a substantial question.

A. *The Mere Elimination of Competition Between Appellees Will Not Constitute a Restraint of Trade.*

The district court found on the basis of all the evidence that "the elimination of one competitor will not result in the lessening of vigorous competition in the commercial banking field" (J. S. 37a), and further, that "the only competent testimony upon the subject establishes that competition will be more vigorous after the merger" (J. S. 40a). The district court's reference to "the only competent testimony" is based not only on the opinions of appellees' experts but on the testimony of officers from eight competing banks in Philadelphia and appellant's only expert who was familiar with Philadelphia banking (Tr. 2378, 3369, 3061-3, 3099-3100, 3191-2, 3238-9, 3274-5, 3453-5, 3551-3, 3845-7, 1608-9).

Despite this testimony and the findings based thereon, appellant continues to argue that the elimination of competition between appellees will constitute a violation of Section 1 of the Sherman Act, relying on the old railroad cases decided by this Court in the early 1920's (J. S. 20-21). Appellant cited these same railroad cases to this Court in

2. Appellant itself acknowledges that the quantum of proof required to obtain an injunction under Section 1 of the Sherman Act is much greater than that required under Section 7 of the Clayton Act (J. S. 29).

United States v. Columbia Steel Co., 334 U. S. 495 (1948), where they received the following treatment (334 U. S. at 531):

> "The government cites four antitrust cases involving railroads to support its argument that control by one competitor over another violates the Sherman Act, even though the percentage of business for which they compete may be small. * * * The factual situation in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief requested by the government."

The railroad cases are even less applicable to the field of commercial banking in the four-county area than they were to the steel industry, particularly when it is recognized that there would still be 41 banks located in the four-county area, an additional 75 in the surrounding six counties, and many others located throughout the United States which also compete in the four-county area (J. S. 30a-31a, 39a; Def. Fdgs. 52, 158, App. 8b-9b, 20b).

Other than the mere fact of the merger, the only evidence in the record upon which appellant relies to justify the extraordinary relief of injunction consists of statistical compilations.[3] While the district court accepted these figures as being arithmetically correct, it refused "to accept

3. The three agency reports to the Comptroller of the Currency under the Bank Merger Act of 1960 are evidence only of the fact that the procedures required by the Act were followed. The opinions contained in these reports are based on the same statistics which were introduced in evidence in this case and which are discussed hereafter. Moreover, these opinions, as such, are purely hearsay, since appellant failed to call a single representative of any of those agencies to testify in support thereof and to be cross-examined. See *United States v. International Harvester Co.*, 274 U. S. 693, 703 (1927). The district court concluded that it could not give legal effect to the opinions reached by these agencies since there was not "a single shred of evidence" to support them (J. S. 46a).

the conclusions" which appellant seeks to draw from them (J. S. 7a).

B. *Appellant's Statistics Do Not Constitute Evidence of a Restraint of Trade.*

The statistics upon which appellant relies disclose only the amount of business done by each bank with a head office in the four-county area. As such, they provide no information from which restraint of trade can be inferred.

These figures do not represent market shares and they are in no way comparable to those presented in the anti-trust cases cited by appellant. In the first place, they do not include the business done by the many banks from all over the United States which "solicit business in the Philadelphia area on an intensive and regular basis" and which "derive substantial business from Philadelphia" (Def. Fdg. 52, App. 8b-9b; J. S. 30a-31a). Furthermore, the figures for the banks located in the four-county area include all of their business done outside that area (J. S. 31a; Def. Fdgs. 50-51, App. 7b-8b). For example, 43% in dollar amount of appellees' commercial and industrial loans are made to customers outside of the four-county area, yet appellant includes all of these loans in the percentages which it claims show "concentration" in the four-county area. Such distortions are substantial and led the court to find that (Def. Fdg. 56, App. 9b):

> "Plaintiff has introduced no evidence bearing on defendants' proportion of the entire banking business done within the four-county area by all banks deriving business from that area, in any category of business."

In view of this finding, appellant's attempt to create a substantial question by its repeated use of the word "concentration" is unjustified.

In discussing the "strength of the remaining competition", appellant does not dispute the finding of the district

court that "The commercial banks in Philadelphia today are strong and vigorous competitors in offering commercial banking services to the public" (Def. Fdg. 123, App. 14b). Instead, it argues without reference to the testimony that "the proposed consolidated bank will alter radically the existing competitive situation among all commercial banks with head offices in the four-county area" (J. S. 23, 7). The merger will create a new bank which will be larger than any other in Philadelphia but still considerably smaller than its competitors in New York and elsewhere. This increased size, however, will not give the new bank a competitive advantage in the four-county area except for the large customers whose banking requirements cannot now be met by any local bank (Def. Fdg. 145, App. 18b).

On the basis of the uncontradicted testimony of experienced banking witnesses, the district court found that "Large commercial banks do not have a competitive advantage for business within the range of the resources of smaller banks" (Def. Fdg. 40, App. 6b). This finding reflects the inherent nature of commercial banking and the effect of an intensive scheme of governmental regulation which, as the district court found, has made "convenience, quality of service and personal relationships" the principal factors in competition (J. S. 8a, 22a-24a; Def. Fdgs. 9-43, App. 2b-6b). The testimony of bankers that small banks can compete as effectively as large banks for the customers within the range of their resources was confirmed by the fact that in the last decade virtually all of the banks in the four-county area which are smaller than appellees increased their deposits at a faster rate than did appellees (Def. Fdgs. 110, 113-122, App. 12b-14b). In addition, several of the smaller Philadelphia banks have successfully opened new branches in the center of the City in recent years, and an entirely new bank, established just outside the City limits, has experienced rapid and extensive growth (Def. Fdgs. 111-112, App. 12b-13b). Thus, all of the

testimony and other evidence in the record refutes appellant's argumentative inference that the size of the merged bank will give it a competitive advantage in the four-county area.

Final proof that appellant's statistics are totally lacking in probative value is provided by a comparison with statistics similarly computed for other cities. It was shown, for example, that there are 190 cities out of the 224 in the United States with more than 50,000 population, and 78 cities out of the 110 with populations over 100,000, in which the lead bank has a greater percentage of total bank assets than the merged bank would have in the four-county area (Def. Fdgs. 128-144, App. 15b-18b). These numbers are too large to be ignored.[4] They prove either that appellant's method of computing "concentration" on purely local bank figures is no measure of relative competitive strength or that a restraint of trade presently exists in most of the large cities of the United States. The failure of appellant to produce any evidence which would support the latter alternative, and the affirmative testimony of the former Deputy Comptroller that there is adequate competition in each of these cities, support the district court's finding that "no dangerously potential concentration will result from this merger" (Tr. 3327; J. S. 26a).

As for the trend toward concentration visualized by appellant, which again is a Clayton Act concept, the district court had this to say (J. S. 41a):

> "The competitive situation that exists in the four-county area, with the many alternatives available to a prospective customer, leads to the inescapable conclu-

4. In footnote 15 on page 23 of the Jurisdictional Statement, appellant attempts to dispose of the statistics showing the level of banking concentration in other cities by stating that they were presented without proof of certain surrounding facts which appellant considers to be important. Appellant has overlooked Exhibit D-21, in which these facts are set forth in detail.

sion that any tendency to monopoly or oligopoly at this stage is nonexistent."

The competitive situation in the four-county area to which the district court referred consists not only of the 41 other banks located therein, but also the banks from all over the United States which do business in the four-county area. The district court said, "It was very surprising to learn at the trial of this case that not only New York banks solicit and receive substantial business from customers within the four-county area, but also large banks from all the larger cities in the nation do likewise" (J. S. 30a-31a). The competitive significance of this statement is apparent from the fact that more than 68% in dollar volume of the appellee's commercial and industrial loans are made to, and at least 64% of the appellee's demand deposits from partnerships and corporations are received from, customers whose banking choices include commercial banks located outside the four-county area (Def. Fdg. 52, 9b). Thus, banks from all over the United States, as well as those in the four-county area, will be competing for the major share of the merged bank's business.

In fact, it is the inability of any Philadelphia bank to satisfy the banking needs of the larger local enterprises in the national market which has inspired this merger. Business leaders, competing bankers and city officials uniformly testified that Philadelphia needs a substantially larger bank to accommodate the requirements of its expanding industry, commerce and foreign trade. This is not a matter of "civic prestige", as appellant cynically argues; it is, as the district court found, a matter of importance to local businesses "because of the close contacts which are required between their top officers and the bankers" (Def. Fdg. 176, App. 22b). It is also of importance to appellees, which have been losing local business to larger banks located in other cities including such smaller cities as Cleveland, Pittsburgh, Boston and San Francisco (Def. Fdgs. 178-185, App. 23b-24b).

Although the district court was careful to avoid relying upon these public benefits as a ground for dismissal of the complaint, it nonetheless found that the merger "will definitely benefit the community" (J. S. 34a, 48a).

As opposed to all of this uncontradicted testimony and evidence which support the district court's conclusion that no unreasonable restraint of trade will result from the merger, there is only the appellant's argument that the merger itself will automatically cause a restraint. This unsupported assertion does not raise a substantial question and should not be allowed to delay further this merger which was approved by the Comptroller of the Currency more than a year ago.

CONCLUSION.

For the foregoing reasons, the questions presented by this appeal are unsubstantial and the district court's judgment should be affirmed.

Respectfully submitted,

ARTHUR LITTLETON,
ERNEST R. VON STARCK,
DON B. BLENKO,
DONALD A. SCOTT,
Attorneys for The Philadelphia National Bank, Appellee.

MORGAN, LEWIS & BOCKIUS,
Of Counsel.

April 16, 1962